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In the Supreme Court of the United States

OCTOBER TERM 1943.

No. 580.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

ABRAHAM GOLDBERG,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

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We respectfully submit that the mere statement of the case will show that there is nothing in this record deserving of review by this Court.

The Respondent in a suit for a declaratory judgment on a life insurance policy claimed as ultimate facts that

(1) he was totally disabled by bodily disease so that he was unable to engage in any occupation for profit;

(2) this total disability attached before he attained the age of sixty.

The United States District Court without a jury heard the factual evidence on these ultimate facts and resolved them affirmatively in favor of the Respondent. The Finding of Facts states the following ultimate facts which were in controversy:

(a) The date of the birth of the Respondent—Dec. 15, 1878;

(b) The date the Respondent became disabled—July 1, 1938;

(c) Whether the disability was permanent—Permanent.

The trial court is not required by Rule 52 to make rulings on all the facts presented and need only find the ultimate facts as are necessary to reach a decision in the case and the judgment should stand if the opinion below gives the appellate court a clear understanding of the basis of the decision[1] even if the rule is violated.[2] The memorandum

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[1] *Klimkiewicz v. Westminster Deposit & Trust Co., et al.*, United States Court of Appeals for the District of Columbia. Decided Sept. 22, 1941. 122 Fed. Rep. 2d, 957. Certiorari denied. 315 U. S., 805:

"Syl. 2. Under the new federal procedural rules, the trial court is not required to make findings on all the facts presented but need only find such ultimate facts as are necessary to reach the decision in the case. *Federal Rules of Civil Procedure*, rule 52, 28 U. S. C. A. following section 723c."

"Syl. 3. A judgment, attacked on appeal on ground that district court's findings of fact do not comply with court rule, should stand if the opinion below gives the appellate court a clear understanding of the basis of the decision. *Federal Rules of Civil Procedure*, rule 52, 28 U. S. C. A. following section 723c."

[2] *Goodacre v. Panagopoulos et al.*, United States Court of Appeals for the District of Columbia. Decided March 4, 1940. 110 Fed. Rep. 2d, 716, 718:

"The District Court evidently failed to comply with the requirement of Rule 52(a) that it 'find the facts specially and state separately its conclusions of law thereon.' It does not follow that we must reverse the judgment. Like its predecessor, Equity Rule 70½, Rule 52(a) 'is intended to aid appellate courts by affording them a clear understanding of the basis of the decision below.' We have held that, when this clear understanding is afforded, the judgment may stand although the rule is violated."

* * * * *

"We do not understand *Interstate Circuit, Inc. v. United States* (cited by Respondent), to require reversal for a merely formal failure to comply with the rule. It is true that the Supreme Court there emphasized the fact that the District Court did not 'find the facts specially and state separately its conclusions of law as the rule required.' But the vice of the findings there was not merely that they were informally made. Although the District Court, in its opinion, made many findings of underlying facts, it nowhere made some of the findings which the majority of the Supreme Court thought necessary to an understanding of the decree."

opinion of the trial judge was adopted *in toto* on the question of the date of birth of the Respondent, the only issue of fact concerning which there is a dispute now, which is the best proof that the Circuit Court of Appeals understood the basis of the decision of the trial judge.

The difference in the Findings of Fact adopted by the trial court (R. 83) and complained of by the Petitioner and the findings of fact tendered the trial court by the Petitioner (R. 87, 88, 89, 90) is as follows:

Findings of Fact of Trial Court	Findings of Fact Proposed by Petitioner
Date of Birth December 15, 1878	Date of birth May 15, 1878
Disability permanent	Disability temporary (this was abandoned by the Petitioner in the Circuit Court of Appeals, Petitioner admitting that there was sufficient evidence to warrant a finding of permanent disability)
Disability occurred July 1, 1938	Disability occurred June or July, 1938 (Petitioner admitted in the Circuit Court of Appeals that disability occurred July 1, 1938 (R. 98))

The claim that the trial court did not separately state its Findings of Fact as required by Rule 52 is without merit.

The United States District Court and the Circuit Court of Appeals considered all the matters of evidence argued in Petitioner's brief and considerably more, as the record indicates, and resolved all the evidence in favor of the Respondent. There can hardly be any question but that both of these courts correctly decided the question of fact as to when the insured was born and whether he became disabled before attaining the age of sixty, and there likewise can be no question but that the correctness or incorrectness of this determination of fact on this ultimate issue of fact is not subject matter deserving of review by this Court.

The Petitioner argues that this Court should admit this case pursuant to Rule 38, paragraph 5, sub-division b, in that the Circuit Court of Appeals disregarded the applicable state law in ruling that the burden was on the Petitioner to show that the Respondent had not brought himself within the insuring clause. A reading of the opinion of the United States District Court leaves but one conviction, to-wit, that regardless as to who had the burden of proof, the trial court found that the greater weight of the evidence showed that the Respondent was totally disabled before he attained his sixtieth birth date. If this case were tried to a jury in the United States District Court, the question of burden of proof would have been important so far as the charge of the Court to the jury is concerned, but in the instant case, where both parties went forward with their evidence, and the United States District Court as the trier of facts found that the Respondent's disability was total and attached before attaining the age of sixty by the greater weight of the evidence, the question as to who had the burden of proof is immaterial, and any statements concerning the burden of proof made by the United States Circuit Court of Appeals is *obiter dictum*. Even that *obiter dictum* is correct.

With reference to the cited case of *Armstrong v. Insurance Co.*, 4 Ohio Appeals 46, we wish to point out that the cited case involved an accident policy and the court admitted, at page 56, that a different rule applies "in actions brought upon an ordinary life or fire insurance policy to actions based upon accident policies." The cited case of *Hancock Insurance Co. v. Hicks*, 43 Ohio Appeals 242, 183 N. E. 93, involved a claim by the insurer that the disability arose prior to the delivery of the policy and a claim by the insured that the insurer could not raise this defense because of the incontestability clause, issues which are not in the case at bar. The ruling of the Court in the *Hicks* case that the defense of the insurer was not barred by the

incontestable clause has been repudiated as an authority in Ohio; the *Hicks* case was the only Ohio case referred to by the court in the case of *Metropolitan Life Ins. Co. v. Onstott*, 31 Ohio Nisi Prius (New Series) 374, and that decision was reversed by the Court of Appeals for the First Appellate District of Ohio which decision is unreported but available and the Supreme Court of Ohio overruled a motion to certify the decision of the said First Appellate District Court. Further, syllabus three in the *Hicks* case states that "an insurer must plead and prove exceptions to the risk covered by policy" which the Petitioner insurer in the case at bar undertook to do but failed to do.

In addition to the Ohio cases cited by the Circuit Court of Appeals to support its conclusion (R. 115) it is stated in the case of *Langan v. United States Life Ins. Co.*, 130 S. W. 2d, 483:

> "Of course, the burden is upon the insurer to prove the incorrectness of the stated age of the insured."

In the case of *Wolen v. Metropolitan Life Ins.*, 5 N. E. 2d, 249, syllabus 8 states:

> "In a suit on life policy containing double indemnity clause the burden was on insurer to show that the insured understated his age in his application for insurance."

Syllabus 9: "Statements made by the insured presumed to be truthful and the defense that the insured understated his age in his application is required to be proved by clear and cogent evidence."

Couch in his work on *Insurance* states, Vol. 8, page 7342:

> "In the absence of proof to the contrary, a presumption exists that the applicant has truly stated his age wherefore the insurer, relying on a forfeiture for misstatement of age, has the burden of proving the falsity."

We suggest that the language in the policy providing that the waiver of premium benefits are to be ineffective after the insured attains the age of sixty is in the nature of a defeasance, an exemption of liability, and is a condition subsequent and the burden was on the Petitioner to prove that the Respondent had not brought himself within the meaning of the insuring clause.[3]

We suggest that if it is a condition precedent to recovery that the Respondent show that the disability arose before he attained the age of sixty, the Respondent made out a prima facie case by offering the policy in evidence

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[3] *Humble v. The John Hancock Life Insurance Co.*, 28 Ohio Nisi Prius, New Series, 481, 483. Affirmed 31 N. E. 2d, 887:

"The question involved here is with reference to burden of proof, rather than being one of directed verdict. The plaintiff made a prima facie case when she showed that the policy was issued and delivered to the insured; that the premiums were paid; and, that proper notice and demand were made upon the defendant for payment of said policy. This being the case it was incumbent upon the defendant to offer some evidence sustaining its defense. When this was done it became a question of fact for the jury to determine whether or not the insured was in sound health on the date of the policy, and whether or not she had been attended by a physician for a serious disease within two years prior to that time. The question, therefore, is: Did the court properly charge the jury upon the burden of proof with reference to these two defenses? Counsel for the defendant in their brief claim that these provisions of the policy were conditions precedent, and that the burden of proof is, therefore, upon the plaintiff to establish by a preponderance of the evidence that these conditions have been performed. We think it is well established in this state that such conditions have been termed conditions subsequent, and as such the burden of proof is upon the defendant."

Mumaw v. The Western & Southern Life Insurance Co., 97 Ohio State, 1, 9:

"It is more in the nature of a defeasance, where the insured contracts that, if the representations made by him are not true, the policy shall be defeated and avoided. But, even if these warranties are to be deemed conditions precedent, it has become settled in insurance law, for practical reasons, that the burden is on the insurer to plead and prove the breach of the warranties."

(see *Humble v. The John Hancock Life Ins. Co., supra*, and *Goell et al. v. U. S. Life Ins. Co.*, 40 N. Y. S. 2d, 779, decided April 9, 1943)[4] which presumption stands until the Petitioner goes forward and clearly proves that the Respondent's statements as to age as contained in the application, were wilfully false, fraudulently made, etc.[5] The Petitioner argues that the burden is on the Respondent to go forward and that the Respondent has the burden as a condition precedent to recovery, to show his date of birth.

The effect of Ohio General Code Section 9391 cannot be escaped by the device of contracting to the contrary or labeling the contractual attempt to do so a "condition precedent" to the attaching of the risk or putting the bur-

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[4] "Syllabus 1: "In action to recover disability payments due under a life policy, where insurer sought reformation on ground that insured had misrepresented his age, plaintiff made out a 'prima facie case' by offering the policy in evidence and giving proof of his disability."

Syllabus 2: "Presumption that age stated in life policy is true age stands until rebutted by evidence which may fairly satisfy the jury that insured was in fact of some other age which would preclude insured's right to any recovery."

Syllabus 3: "Insurer had the burden of establishing affirmative defense that either by mutual mistake or unilateral mistake on part of insurer and fraud of insured, life policy did not represent true agreement between parties, in that insured's disability occurred after the anniversary of the life policy on which insured's age at nearest birthday was 60 years."

[5] Ohio General Code Section 9391:

"No answer to any interrogatory made by an applicant, in his or her application for a policy, shall bar the right to recover upon any policy issued thereon, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is wilfully false, was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, also that the agent or company had no knowledge of the falsity or fraud of such answer." (This section when enacted contained the caption, "An act for the better protection of holders of life insurance policies.")

den on the insured to prove the truth of any representation he makes in his application for a policy.[6]

The policy, in addition to providing for waiver of premiums in the event the Respondent became disabled before attaining the age of sixty, also provides in Paragraph 4 (R. 45):

"Premium and Discontinuance.

The annual premium for the benefit provided in this section is Ten Dollars ($10.00) payable in addition and in the same manner as regular premiums under this contract, but not beyond age sixty."

By the terms of this policy, even as construed by the Petitioner, actual age and not age at the anniversary of the policy at nearest birth day, is the governing factor. By the terms of this policy the premium for this benefit was payable annually on March 22nd of each year. On March 22, 1938 the Respondent had not attained the age

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[6] *Prudential Ins. Co. of America v. Saxe*, United States Court of Appeals for the District of Columbia. Decided Jan. 25, 1943. Writ of Certiorari Denied May 3, 1943. 134 Fed. Rep. 2d, 16, 24, 25:

"Since the full first premium was not paid at the time of making the application, Prudential insists this clause made the truth of the statements 'conditions precedent to attaching of the risk,' and that they were not fulfilled because the statements were not true in fact. In this view it would be immaterial whether the insured knew they were contrary to fact or intended them to deceive, or whether they were material to the risk or its acceptance. An entirely innocent misstatement, whether or not material, would keep the policy from taking effect. This, in substance, would make the statements warranties. It also would nullify the intended effect of Section 35-414. That section, at the very least, was intended to prevent innocent and immaterial misrepresentations in the application from avoiding the insurance, and its effect cannot be escaped by the device of contracting to the contrary or labelling a contractual attempt to do this a 'condition precedent' to attaching of the risk. The very purpose of the action was to nullify contractual provisions contrary to its terms and effect. If therefore the so-called 'condition precedent' is by its terms more broadly effective than the statute allows, to that extent it is invalid." (Section 35-414 referred to is similar to Ohio General Code 9391.)

of sixty, whether he was born on May 15, 1878 as claimed by Respondent or December 15, 1878 as found by the lower courts. The Petitioner therefore on March 22, 1938 collected an annual premium for this benefit. The Petitioner cannot consider the policy effective for the purpose of collecting premiums to March 22, 1939, and not consider the policy effective for the purpose of coverage to March 22, 1939.

We suggest that since Ohio General Code Section 9420(5) provides[7] that the company has only the right to *reduce the amount payable* if the age of the insured is understated; we seriously doubt whether the company has the right to *defeat* recovery of waiver of premium benefits because of an understatement of age.

It is stated in the case of *Insurance Co. v. Snyder*, 52 Ohio Appeals, 438, 445, that

> "We hold the provisions of Section 9420, General Code, must be read into the policy in question, and that the statutory provisions are controlling, even where opposed to the express provisions of the policy, unless the policy provisions are more favorable to the insured than are the statutory requirements."

We most respectfully submit that the Petition for a Writ of Certiorari should be denied.

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[7] Ohio General Code Section 9420:

"Policies other than standard forms. No policy of life insurance in form other than as provided in sections 9412 to 9417, both inclusive, shall be issued or delivered in this state or be issued by a life insurance company organized under the laws of this state unless the same shall contain the following provisions: * * * (5) A provision that if the age of the insured has been understated the amount payable under the policy shall be such as the premium would have purchased at the correct age."